PP v. MOHD BAKRI SAMSU & ANOR

HIGH COURT MALAYA, IPOH
NOORIN BADARUDDIN JC
[CRIMINAL APPLICATION NO: 44-56-11-2014]
27 OCTOBER 2015

CRIMINAL LAW: *Money laundering – Forfeiture – Discovery of excess payment and outstanding processing fee by employee – Cheques cashed by authorised individuals and monies transferred to directors' accounts – Application for order of forfeiture of properties seized from directors – Whether properties obtained by directors through illegal activity committed by employee – Anti-Money Laundering, Anti-Terrorism and Proceeds of Unlawful Activities Act 2001, ss. 50(1) & 61(2)*

Mardec Processing Sdn Bhd ('MPSB') had entered into an agreement called the 'Toll Processing and Finished Products Buyback Agreement' ('the agreement') with Molek Capital (M) Sdn Bhd ('Molek Capital'). The first and second respondents were the directors of Molek Capital. Under the agreement, Molek Capital was to supply rubber scraps to MPSB factory to be processed into rubber blocks with a processing fee charged to Molek Capital. It was later discovered that there was an excess payment amounting to RM18 million as well as an outstanding of RM5 million processing fee, both to and from Molek Capital, made by a manager of MPSB ('Faizal'). Mardec Berhad ('Mardec') lodged a police report against Faizal for inducing its subsidiary, MPSB to make overpayment to Molek Capital. Total payments made by MPSB to Molek Capital from August 2011 to October 2012 were RM86,772,000 *via* 197 cheques ('the cheques') from MPSB's RHB Bank and the payments were made by Faizal. The cheques were cashed by individuals who were authorised by Molek Capital and the monies were transferred to the accounts belonging to the first and second respondents, individuals who were responsible in managing the company's financial and account. The prosecution ('the applicant') filed for an order of forfeiture of the properties seized from both the respondents under s. 50(1) of the Anti-Money Laundering, Anti-Terrorism and Proceeds of Unlawful Activities Act 2001 ('the Act') and relied on three documents, namely, (i) reconciliation report; (ii) purchasing contracts; and (iii) the cheques obtained during investigation. By way of a notice of motion ('encl. 1'), the applicant moved the court to publish a notice in the *Gazette* to call upon any third party who claims to have any interest in the properties seized from both the respondents to attend before the court to show cause as to why the property should not be forfeited under s. 61(2) of the Act.

Held (dismissing application in encl. 1):

(1) The evidence adduced by the applicant failed to prove that the properties were obtained by both the respondents through the said illegal activity committed by Faizal. What the applicant did was to invite the

court to accept the exhibits as evidence of overpayments and nothing more. The applicant failed to adduce evidence connecting the documents to show the overpayments and how the overpayments came about. (para 38)

(2) There were unexplained contradictions and/or inconsistencies appearing in the items of the exhibits when they were compared. The total number of the purchasing contracts did not tally with the ones stated in the reconciliation report. The investigation officers also failed to state how the items such as the dates in the reconciliation reports were reconciled with the dates of the purchasing contracts. No explanation was given as to how the final price was deduced or derived at in the reconciliation reports compared with the price stated in the purchasing contracts. Explanation as to how the cheques were reconciled in the reconciliation reports was absent. (paras 40 & 42)

(3) There was insufficient evidence to show how the properties in the form of the lands belonging to the first respondent were acquired and were proceeds from an illegal activity committed by Faizal. The evidence that the sale of the land to other third parties by the first respondent took place during the tolling transactions between MPSB and Molek Capital were too remote to connect the property as proceeds from an illegal activity committed by Faizal. (para 45)

(4) When the applicant failed to prove the overpayments and that the respondents had utilised the money from Molek Capital's account which derived from the said illegal activity, the burden had not been discharged on balance of probabilities. It will be the duty of the respondents to prove otherwise only when the burden is discharged. It was insufficient to make a finding of proof on balance of probabilities that those properties seized were proceeds from illegal activity committed by a third party by relying on the documents without any explanation as to their connections and as to how the calculations/reconciliations were derived at. As such, the application for forfeiture order was denied. Consequently, the notice under s. 61 of the Act was premature as it would only come into play when the court makes an order of forfeiture under s. 56 of the Act. (paras 48 & 51)

Case(s) referred to:

Ngeranter Ripai v. PP [1990] 2 CLJ 273; [1990] 2 CLJ (Rep) 530 HC ***(refd)***

SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors [2009] 6 CLJ 705 FC ***(refd)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 3(1), 4(1), 50(1), 56(1), (2), (4), 61(2), Second Schedule

Penal Code, s. 409

For the applicant - Nur Ashikin Mokhtar; DPP
For the 1st respondent - Mohd Zainuri Mohamad Zahir (Shamsul Nizam with him); M/s Zainuri & Co
For the 2nd respondent - Mohd Nor Azam Majid; M/s Azam Majid & Assocs
Watching brief for MARDEC - Tan Wen Hong

Reported by Najib Tamby

JUDGMENT

Noorin Badaruddin JC:

[1] On 13 November 2014, by way of a notice of motion ('encl. 1'), the applicant moved this court to publish a notice in the *Gazette* to call upon any third party who claims to have any interest in the properties seized from both the respondents to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited under s. 61(2) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (hereinafter referred to as 'the Act').

[2] The application was made pursuant to s. 56(1) of the Act wherein the applicant applied for this court for an order of forfeiture of the properties seized from both the respondents under s. 50(1) of the Act.

[3] As against the first respondent, the application was made for an order for forfeiture of the following properties:

(a) money with the amount of RM572,909.31 and any interest accumulated from it in current account no. 20212600003455 at RHB Bank Berhad, Jitra Branch, Kedah owned by the first respondent seized on 14 November 2013;

(b) money with the amount of RM18,560.98 and any interest accumulated from it in current account no. 102122600014770 at RHB Bank Berhad, Jitra Branch, Kedah owned by the first respondent seized on 14 November 2013;

(c) money with the amount of RM6,714.13 and any interest accumulated from it in current account no. 0204100363005 at CIMB Bank Berhad, Persiaran Sultan Abdul Hamid Branch, Kedah owned by the first respondent seized on 14 November 2013;

(d) money with the amount of RM206,720.12 and any interest accumulated from it in Amanah Saham Bumiputera account no. 250634372 at Amanah Saham Nasional Berhad Headquarters, Kuala Lumpur owned by the first respondent seized on 15 November 2013;

(e) a piece of land at PM 1622, Lot 5222, Mukim Padang Kerbau, Sungai Ma, Daerah Pendang, Kedah owned by the first respondent seized on 12 December 2013;

(f) a piece of land at GM 1040, Lot 6498, Mukim Ayer Puteh, Lubuk Reba, Daerah Pendang, Kedah owned by the first respondent seized on 9 December 2013; and

(g) a piece of land at 26/831 Bahagian, GM7, Lot 7752, Bandar Pendang, Kampung Tok Besar, Daerah Pendang, Kedah owned by the first respondent seized on 9 December 2013.

[4] As against the second respondent, the application was made for an order for forfeiture of the following properties:

(a) money with the amount of RM1,459,899.78 and any interest accumulated from it in saving account no. 10212600015742 at RHB Bank Berhad, Jitra Branch, Kedah owned by the second respondent seized on 14 November 2013;

(b) money with the amount of RM100,378.21 and any interest accumulated from it in current account no. 20212600003510 at RHB Bank Berhad, Jitra Branch, Kedah owned by the second respondent seized on 14 November 2013.

(c) The value of 200g gold and any interest from it in savings account no. 02070046904528 at CIMB Bank Berhad, Kuala Nerang Branch, Kedah owned by the second respondent seized on 14 November 2013; and

(d) money with the amount of RM18,474.37 and any interest accumulated from it in Simpanan Lembaga Tabung Haji account no. 030801000153072 at Lembaga Tabung Haji, Kuala Nerang Branch, Kedah owned by the second respondent seized on 15 November 2013.

[5] In the application of encl. 1, it was stated that the Public Prosecutor (PP) was satisfied that the properties seized by the investigating officer from the Royal Malaysia Police (PDRM) mentioned above on 14 November 2013, 15 November 2013, 9 December 2013 and 12 December 2013 were properties obtained as a result of an offence under s. 4(1) of the Act.

[6] The application in encl. 1 was supported by the affidavits of Akmazatul Mohamad Nawi, a Deputy Public Prosecutor from the Prosecution Department, Attorney General's Chambers Putrajaya affirmed on 12 November 2014 (encl. 2); ASP Azizah binti Haji Adam, the investigating officer for the predicate offence from the Royal Malaysia Police affirmed on 12 November 2014 (encl. 3) and Inspector Muhamad Hamirrudin bin Mohd Rashid, the investigating officer for the offence under the Act affirmed on 12 November 2014 (encl. 4).

Background

[7] Mardec Processing Sdn Bhd, a company incorporated in Malaysia under the Companies Act 1965 ('MPSB') had entered into an agreement called the 'Toll Processing And Finished Products Buyback Agreement" ('the agreement') with one company by the name of Molek Capital (M) Sdn

Bhd ('Molek Capital') signed on 1 March 2012. MPSB is in the business of processing natural rubber and has the expertise, facilities and machineries to process natural rubber at its factories in and around Malaysia. One of the factories was situated in Bota Kanan, Bota, Perak.

[8] The directors of Molek Capital were Mohd Sadad bin Mahmud, Mohd Bakri bin Samsu (first respondent) and Muhamad Fadzil bin Mad Khair (second respondent). Molek Capital's main business involved the trading (buying and selling) of scrap rubber materials. The main directors of the company were the first and second respondents while Mohd Sadad was a sleeping partner.

[9] It was agreed in the agreement that Molek Capital was to supply raw materials (rubber scrap) to MPSB factory to be processed into rubber block 'Standard Malaysia Rubber 20' ('SMR 20') with a processing fee charged to Molek Capital. Then, MPSB will buy back the SMR 20 rubber from Molek Capital and made payment based on the current actual market price of SMR 20 after deducting the processing fee.

[10] Mohammad Razali bin Abdul Hamid was an Assistant Manager of Mardec Berhad ('MARDEC') having the address at Bangunan Mardec, Jalan Ayer Kerja Lama, 68000 Ampang Selangor. He was authorised and instructed by both MARDEC and MPSB (MPSB being the subsidiary company to MARDEC) to lodge a police report against one Muhammad Faizal bin Sudin, a Manager of MPSB based in Bota Kanan, Bota, Perak for inducing MPSB to make over payment to Molek Capital against the terms of the agreement.

[11] Muhammad Faizal bin Sudin was appointed as an assistant manager on 1 May 2006 of MPSB in Bota Kanan, Bota, Perak and later promoted as manager until 20 November 2012. His duties and responsibilities were to monitor the processing of rubbers as well as being in charge of the financial affairs of MPSB factory in Bota Kanan, Perak. Muhammad Faizal was to ensure that payments made to Molek Capital were based on the actual price of the processed rubber in accordance with the agreement.

[12] The method of payment to MPSB as agreed in the agreement was by way of invoices prepared by Molek Capital for the price of buying back the SMR 20 after deducting the processing fee. An advance of 75% be paid by MPSB to Molek Capital during the delivery of the raw material at MPSB factory and the balance of 25% will be paid in 20 days after the receipt of the raw materials.

[13] According to the agreement, both parties had agreed that the processing fee would be 65 cents per kilogram for SMR 20 with an additional of 3 cents per kilogram for the cost of transportation of the raw material.

[14] Sometimes in September 2012 MARDEC management team had made a reconciliation in relation to Molek Capital account for the payments of the tolling trading. Based on the reconciliation, it was discovered that there was an excess payment amounting to RM18 million as well as an outstanding of RM5 million processing fee, both to and from Molek Capital. The excess payment to Molek Capital was believed to be paid by Muhammad Faizal.

[15] From the investigation, it was said that Muhammad Faizal had made payment to Molek Capital against the terms and conditions as provided in para. 9 (fee and expenses) of the agreement.

[16] According to the affidavit of the investigating officer, the tolling trading between MPSB and Molek Capital for the month of August 2011 until October 2012, with reference to the several purchasing contracts by MPSB, the total rubber supplied by Molek Capital were 11,457.87 metric ton which produced about 7,788.793 of metric ton SMR 20 and worth of RM80,606,741. MARDEC had made some coordination and discovered that the processed rubber from all raw rubber materials supplied by Molek Capital were only about 6,542.91 ton metric of SMR 20 worth of RM6,498,774. This showed a reduction of 1,244.883 ton metric worth of RM12,107,967. The payments made by MPSB to Molek Capital *via* the 197 cheques were RM86,772,000. The actual price on the other hand and based on the contract were said to have been RM80,606,741. On this calculation, it was alleged that there were excess of payments amounting to RM6,165,259.

[17] The investigating officer reaffirmed that from her investigations the total payments made by MPSB to Molek Capital for the month of August 2011 until October 2012 were RM86,772.00 *via* 197 cheques from MPSB's RHB Bank. The payments made to Molek Capital were said to have been made by Muhammad Faizal. He was also one of the persons who signed the cheques. Apart from the 197 cheques, there was only one cheque which the bank had not received its original copy for the payment as the bank was unable to trace the original copy of such cheque.

[18] The investigating officer reaffirmed that from her investigations Muhammad Faizal had made excess payments of RM18,273,225.95 to Molek Capital from August 2011 to October 2012 for trading purposes. The payments from the 197 cheques were not meant to be paid to Molek Capital but to the second respondent (43 cheques worth of RM16,212,000) and four other individuals which were authorised by Molek Capital namely Abu Seman bin Ahmad (12 cheques worth of RM4,727,000), Marwadi bin Muhammad (55 cheques worth of RM22,429,000), Mohd Ikram bin Mohd Nazri (14 cheques worth of RM2,574,000), Muhammad Hazwan bin Ibrahim (73 cheques worth of RM40,830,000). Molek Capital had produced a consent/authorised letter for the individuals to receive the cheques except for the second respondent.

[19] The 197 cheques were said to have been cashed by the authorised individuals at the RHB Bank counter in Ayer Tawar, Perak branch in August 2011 until October 2012. RM84,499,038 were cashed and deposited into Molek Capital RHB Bank Berhad account no. 2021600001355 ('account 1355'). Later, the monies in account 1355 were transferred to the first and second respondents' accounts. Another sum of RM2,087,961.90 was used as payment to Molek Capital's local rubber scrap suppliers.

[20] It was reaffirmed in the affidavit of the Investigating officer that all the monies deposited in account 1355 were from the tolling trading with MPSB. The monies include the excess payments made by Muhammad Faizal. The individuals responsible in managing the company's financial for the 1355 account were the first and second respondents. Both the respondents were the individuals from Molek Capital involved in the trading with MPSB from August 2011 until October 2012. Even though Mohd Sadad and the first respondent were the signatories to the account 1355, the second respondent, being the director of Molek Capital was said to have the knowledge on the said account.

[21] From the entire investigation, the investigation officer averred that the Manager of MPSB in Bota Kanan, Bota, Perak ie, Muhammad Faizal had committed an offence of breach of trust under s. 409 of the Penal Code. He was said to have been entrusted by MPSB to manage the financials of MPSB factory for the tolling trading and to ensure that MPSB make payment to Molek Capital based on the current actual price of the processed rubber in accordance with the terms in the agreement, in which he had breached the trust by making an excessive payments to Molek Capital.

The Law

[22] Section 56(1) of the Act provides as follows:

> **Section 56. Forfeiture of property where there is no prosecution.**
>
> (1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is:
>
> (a) the subject-matter or evidence relating to the commission of such offence;
>
> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or
>
> (d) the instrumentalities of an offence.

[23] The provision of s. 56(1) is subject to s. 61. Section 61 reads as follows:

> Section 61. *Bona fide* third parties.
>
> (1) The provisions in this Part shall apply without prejudice to the rights of *bona fide* third parties.
>
> (2) The court making the order of forfeiture under subsection 28L (1) or section 55 or the judge to whom an application is made under subsection 28L(2) or 56(1) shall cause to be published a notice in the *Gazette* calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.
>
> (3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.
>
> (4) The court or enforcement agency shall return the property to the claimant when it is satisfied that:
>
> (a) the claimant has a legitimate legal interest in the property;
>
> (b) no participation, collusion or involvement with respect to the offence under subsection 4(1) or Part IVA or a terrorism financing offence which is the object of the proceedings can be imputed to the claimant;
>
> (c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;
>
> (d) the claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and
>
> (e) the claimant did all that could reasonably be expected to prevent the illegal use of the property.

The Issues

[24] The issues that arose for determination by this court were:

(i) Whether the applicant had proven that the seized properties were proceeds of unlawful activity under s. 56(2) of the Act; and

(ii) Whether the notice in the *Gazette* to call upon any third party who claims to have any interest in the properties seized from both the respondents to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited under s. 61(2) of the Act could be issued.

[25] As to the first issue, before any forfeiture order could be made on the properties seized, the court must be satisfied that the property is the subject matter of or was used in the commission of an offence under sub-s. 4(1) of the Act and that there is no purchaser in good faith for valuable consideration in respect of the property.

[26] Subsection 56(2) provides:

> (2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied:
>
> (a) that the property is:
>
> (i) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;
>
> (ii) terrorist property;
>
> (iii) the proceeds of an unlawful activity; or
>
> (iv) the instrumentalities of an offence;
>
> (b) that there is no purchaser in good faith for valuable consideration in respect of the property.

[27] Subsection 4(1) states:

> Section 4. Offence of money laundering.
>
> (1) Any person who:
>
> (a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;
>
> (b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence;
>
> (c) removes from or brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or
>
> (d) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity or instrumentalities of an offence,
>
> commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher.

[28] Subsection 3(1) provides for the interpretation as to "unlawful activity" as well as "proceeds of an unlawful activity" and "money laundering" as follows:

A "unlawful activity" means any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence

"proceeds of an unlawful activity" means any property derived or obtained, directly or indirectly, by any person as a result of any unlawful activity

B "money laundering" means the act of a person who:

(a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into
C Malaysia proceeds of any unlawful activity; or

(c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity.

D Where:

(aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or

(bb) in respect of the conduct of a natural person, the person without
E reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity

[29] The applicant contended that from the investigation the property seized were proceeds from an illegal activity by way of an act of criminal breach of trust; a serious offence committed by Muhammad Faizal as the
F then Manager of MPSB, Bota Kanan Perak.

[30] Criminal breach of trust is listed as a serious offence under the Second Schedule of the Act. Serious offence is defined by s. 3 of the Act to mean:

"Serious offence" means:

G (a) any of the offences specified in the Second Schedule;

(b) an attempt to commit any of those offences; or

(c) the abetment of any of those offences.

[31] The applicant further contended that both respondents knew or have
H reasons to believe that the properties seized were proceeds from an illegal activity being the offence of criminal breach of trust committed by the said Muhammad Faizal as all the payments made into their accounts were executed during the tolling transaction. The applicant submitted further that the payments made by Muhammad Faizal contravened the terms stated in the
I agreement specifically cl. 9.1. Clause 9.1 of the agreement stated (ABA5):

9. Price and Payment

9.1 The parties hereby agree that the processing of the Rubber Raw Materials into the Finished Products shall be subject to payment of RM0.65/kg for SMR 20 with consideration of RM0.30/kg being the dry transport fee (hereinafter referred to as "the Processing Fee")

i. The price for the Finished Products sold to MPSB (hereinafter referred to as "the Buyback Price") as follows:

(a) Buyback Price of SMR20 for Long Term Contract at CMA MRB Buyer Noon-RM0.79/kg; (inclusive of government cess 14 cent/kg)

(b) Buyback Price or spot at MPSB actual traded price of the day.

[32] The respondents in their affidavits in reply in summary denied that the monies in their accounts and the various land transactions were proceeds from an illegal activity committed by Muhammad Faizal. They averred that the properties obtained were from their hard earned effort in providing the raw rubber material to MARDEC in accordance with the agreement.

Findings Of This Court

[33] This court must be satisfied that the properties seized from both respondents were proceeds from illegal activity said to have been committed by Muhammad Faizal as the then Manager of the MPSB factory.

[34] The crux of the matter was in relation to the overpayment said to have been made by Muhammad Faizal into the account of Molek Capital. The applicant through the supporting affidavits of the two investigating officers mentioned above claimed that the payment to Molek Capital was inconsistent with the actual amount of the raw rubber materials supplied by Molek Capital and the one processed by MPSB.

[35] The applicant relied on three documents ie, the reconciliation report (ABA6), the purchasing contracts (ABA7) and the 197 cheques obtained during the investigation (ABA8).

[36] From the reconciliation report which was done some time in September 2012, the management of MARDEC realised that there were overpayments made amounting to RM18 million to Molek Capital and around RM5 million in the form of processing fees still outstanding and owing by Molek Capital.

[37] What was stated and reiterated in the affidavits of both the investigating officers were that the whole amount of money deposited into the account of Molek Capital were payment made for the tolling transaction with MPSB executed by Muhammad Faizal. Likewise, as to the properties in the form of lands sold by the respondents to some third parties were said to have been obtained from the illegal activities *via* the overpayments to Molek Capital accounts.

[38] Unfortunately, this court found that the evidence adduced by the applicant through the affidavits and the exhibits attached, failed to prove that the properties were obtained by both respondents through the said illegal activity committed by Muhammad Faizal. What the applicant did was to invite this court to accept the exhibits as evidence of overpayments and nothing more. The applicant failed to adduce evidence connecting those documents and the items therein to show the overpayments and how the overpayments came about. This court did not expect a forensic accountant or an accountant for that matter to come to this court and explain the overpayments made deriving from the reconciliation report but there must be some evidence adduced to show how the overpayments were deduced.

[39] It has been said that document sometimes speaks louder than words or speaks for itself, but when that did not surface from it, something more is expected especially so when the burden on the appellant to prove the case is on balance of probabilities. Section 56(4) of the Act states that:

> In determining whether the property is:
>
> (a) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;
>
> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or
>
> (d) the instrumentalities of an offence
>
> the court shall apply the standard of proof required in civil proceedings

[40] This court was left on its own to make the connections between the exhibits and the items therein. To a certain extent, this court took the obligation to do so, but what transpired was that there were unexplained contradictions and/or inconsistencies appearing in the items of the exhibits when they were compared. Learned counsel for the second respondent had brought to the attention of this court to some of the alleged contradictions:

Laporan Rekonsiliasi RM	Kontrak Pembelian RM	MPSB BT (11)/MC RM
247,752.00	230,788.80	/005/11
1,595,292.00	1,580,920.00	/006/12
1,114,848.00	1,035,295.84	/013/12
3,296,709.50	3,061,466.35	/014/12
360,824.00	854,784.00	/036/12
808,380.00	1,632,960.00	/040/12

[41] Even if this court were to come to an understanding on its own that those alleged contradictions were in actual fact or could be the overpayments made, this court could not presume or assume. When the test is on the balance of probabilities, this court could not act on presumption or assumption. There was no evidence tendered to explain the items stated in the reconciliation report and their connection with the contracts (ABA7) and the cheques (ABA8).

[42] This court further found that the total number of the purchasing contracts in ABA7 did not tally with the ones stated in the reconciliation reports in ABA6. The investigating officers also failed to state in their affidavits how the items such as the dates in the reconciliation reports ABA6 were reconciled with the dates of the purchasing contracts in ABA7. No explanation was given as to how the 'final price' was deduced or derived at in the reconciliation reports compared with the price stated in the purchasing contracts ABA7. Explanation as to how the cheques in ABA8 were reconciled in the reconciliation reports was absent.

[43] Whether there were satisfying grounds to justify forfeiture, proper proof of the relevant facts by means of admissible evidence must be produced. As His Lordship Chong Siew Fai J (as he then was) stated in *Ngeranter Ripai v. PP* [1990] 2 CLJ 273; [1990] 2 CLJ (Rep) 530 at p. 532:

> Forfeiture imposes a severe and harsh penalty on subjects, sometimes even on innocent subjects. Therefore, forfeiture provisions must be strictly construed and applied.

[44] The averments made by the investigating officers merely stated that they relied on the reconciliation reports ABA6 prepared by MARDEC. This court was of the considered view that the appellant should have adduced evidence be it in the form of affidavit or oral from some personnel of MARDEC who prepared and would be able to explain the reconciliation report and the connection of the items contained therein with the contracts ABA7 and the cheques ABA8 and how the alleged overpayments were derived at and that they were executed by Muhammad Faizal.

[45] Furthermore, there was insufficient evidence to show how the properties in the form of the lands belonging to the first respondent mentioned earlier were acquired and were proceeds from an illegal activity committed by Muhammad Faizal. As far as the land transactions involving the first respondent and some other third parties, the evidence based on the averments made by the investigating officers merely on the ground that the sale of the land to the other third parties by the first respondent took place during the tolling transactions between MPSB and Molek Capital, were too remote to connect the property as proceeds from an illegal activity committed by Muhammad Faizal.

[46] The applicant failed to adduce evidence in the form of tracing and connecting the account of Molek Capital with the reconciliation report ABA6, the contracts ABA7 and the cheques ABA8 to show that the money or the transaction involving the lands were related to the overpayments that came from MPSB to Molek Capital account through Muhammad Faizal's act of criminal breach of trust.

[47] Further, this court was made aware of the fact that is a civil suit pending between MARDEC and the respondents claiming *inter alia* the overpayments which had been made to Molek Capital. At the time this application was heard before this court, the civil matter has yet to be determined. In other words the overpayment itself, has yet to be proven.

[48] When the applicant failed to prove the overpayments and that the respondents had utilised the money from Molek Capital's account which derived from the said illegal activity, the burden has not been discharged on balance of probabilities. Only when the burden is discharged, it will be the duty on the respondents to prove otherwise. It was insufficient for this court to make a finding of proof on balance of probabilities that those properties seized were proceeds from illegal activity committed by a third party ie, Muhammad Faizal by relying on the exhs. ABA6, ABA7 and ABA8 without any explanation as to their connections, and as to how the calculations/ reconciliations were derived at.

[49] In *SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors* [2009] 6 CLJ 705, the Federal Court through the judgment of Gopal Sri Ram FCJ at p. 710 stated:

> … *And where that evidence is by way of affidavit the court is not spared the task of subjecting its contents to the same tests as in any other case, if not to stricter scrutiny since the case concerns the violation of a constitutionally guaranteed protection.* One of the tests that a court applies to test allegations in affidavits is to see whether they are contradictory in nature. See, *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18. Further, where a party upon whom the onus of proof lies adduces conflicting or contradictory evidence, a court assessing that evidence is in the usual way entitled to rule that the burden has not been discharged. And in a matter as important as individual liberty, where contradictory averments are made on oath, the detenu is entitled to rely on the version that is most favourable to him. *Put a little differently, where as in circumstances present here, more than one inference may be drawn from the evidence presented by the detaining authority, the inference most favourable to the detenu must be drawn.* I must therefore respectfully reject the invitation of learned senior federal counsel to accept the secretary's evidence and reject that of the minister as inaccurate. Both affidavits were filed on behalf of the detaining authority and it is not, generally speaking, in accordance with the principles governing the evaluation of affidavit evidence that one deponent's version of the facts should be preferred to another when both are giving evidence for the same side. (emphasis added)

[50] This court was entitled to evaluate and scrutinise the evidence adduced. When there were unexplained contradictions, or lack of clarifications in the evidence adduced and those contradictions or lack of clarifications led to more than one inference, the court is entitled to rule that the burden has not been discharged.

[51] In the upshot, based on the affidavits and exhibits, this court found that the applicant failed to establish on balance of probabilities that the properties seized from the respondents were the subject matter of or was used in the commission of an offence under sub-s. 4(1) of the Act. As such the application for the forfeiture order was denied. Consequently, the notice under s. 61 of the Act is premature. Section 61 only comes into play when the court makes the order of forfeiture under s. 56 of the Act.

[52] The application in encl. 1 was therefore dismissed.